UNITED STATES
v.
MONTEZUMA IRON AND PIGMENT CO.

IBLA 73-242 Decided December 28, 1973

Appeal from a decision by the Colorado State Office, Bureau of Land Management, denying appellant's petition for dismissal of the contest complaint or in the alternative acceptance of a late answer and declaring appellant's mining claims null and void.

Affirmed.

Contests and Protests: Generally--Mining Claims: Contests

Under 43 CFR 4.450-4(a)(2), a mining claim contest complaint which describes the contested claims by name, section, township, range, meridian, county, state, and national forest and refers to the book and page of the county records in which the location certificates are recorded contains a "legal description" of the claims.

Attorneys--Contests and Protests: Generally--Mining Claims: Contests--Rules of Practice: Government Contests

A mining claim contest complaint is properly served upon contestee's attorney, if and only if, contestee has authorized such attorney to represent him in the contest proceeding.

Contest and Protests: Generally--Mining Claims: Contests--Rules of Practice: Government Contests

Where a Government mining claim contest complaint contains charges which, if

> proved, would render the claims invalid, and contestee fails to file a timely answer to the complaint in accordance with Departmental regulations, the allegations of the complaint will be taken as admitted by contestee and the claims are properly declared null and void.

APPEARANCES: Joseph L. Sweeney, Esq., and Michael B. Marion, Esq., of Joseph L. Sweeney, Deisch and Marion, P.C., of Denver, Colorado, for appellant; John C. Banks, Esq., and Rogers N. Robinson, Esq., Office of the General Counsel, United States Department of Agriculture, Denver, Colorado, for the Government.

OPINION BY MR. GOSS

Montezuma Iron and Pigment Co. has appealed from a decision by the Colorado State Office, Bureau of Land Management, dated December 6, 1972, denying its petition to dismiss the contest complaint or in the alternative to accept an answer to the complaint filed one day late. The decision also declared appellant's mining claims null and void for failing to make a timely filing of the answer. The claims involved are the Iron Prince Nos. 1 to 3 and Iron King Nos. 1 to 4 Lode Mining Claims and the Red Ace Nos. 1 to 7, Iron Queen, Iron Duke, Iron Bishop, Iron Knight, Louise, Sally, Paul W., and Stan King Placer Mining Claims, located in Sections 6 and 7, T. 6 S., R. 75 W., and Sections 1 and 12, T. 6 S., R. 76 W., 6th P.M., Summit County, Colorado, within the Arapaho National Forest.

The questions on appeal are as follows:

1. Did the Government fail to comply with its own regulations by not including in the contest complaint a legal description of the lands involved?

2. Should the Government have served a copy of the complaint on appellant's attorney?

3. Do the regulations preclude the Government from accepting an answer to a complaint which is not timely filed?

Legal description

Appellant has requested that the complaint be dismissed because the Government failed to identify the mining claims in contest by

legal description as required by 43 CFR 4.450-4(a)(2). Appellant has attempted to distinguish between a "description" of lands and a "legal description". In the complaint the 22 contested claims were described by name. The sections, townships, ranges, meridian, county, state, and national forest where the claims were located were also listed. In addition, the book and page numbers of the county records where the location certificates were recorded were enumerated.

Admittedly, the metes and bounds description of each claim was not specifically set out in the complaint. However, the combination of information contained in the complaint was sufficient to identify the claims. In effect the complaint incorporated the complete descriptions by reference thereto. G. Thompson, Real Property, § 3024 (perm. ed. rev. repl. 1962). Cf. John L. Roper Lumber Co. v. Hinton, 260 F. 996 (E.D. N.C. 1919); Hughes v. Meem, 70 N.M. 122, 371 P.2d 235 (1962). Therefore, the State Office acted correctly in not dismissing the complaint for failing to provide a "legal description" of the claims.

Service upon appellant's attorney

Appellant also contends that the Government should have served a copy of the complaint on its attorney. The complaint was served on appellant's president on September 26, 1972. The Departmental regulation, 43 CFR 4.450-5, requires that the complaint be served on every contestee.

Appellant argues that Joseph L. Sweeney was of record in the State Office as being the attorney for appellant because Mr. Sweeney had previously represented appellant in making application for a mineral survey of some of the claims involved herein. Appellant contends that, according to 43 CFR 4.22(b), Mr. Sweeney should have been the person served with the complaint. Section 4.22(b) reads in part:

> In all cases where a party is represented by an attorney, such attorney will be recognized as fully controlling the case on behalf of his client, and service of any document relating to the proceeding shall be made on such attorney * * *.

Appellant also cites a letter contained in the record dated June 20, 1972, from the Regional Forester to the Chief, Division of Technical Services, Colorado State Office, recommending initiation of a contest against the claims herein involved. In the letter the Regional Forester stated that:

> At the time these claims were investigated the attorney for the company was Joseph L. Sweeney whose office is in the Security Life Building.

There is no dispute that on previous occasions Joseph L. Sweeney has represented appellant. However, Mr. Sweeney was not an officer or employee of appellant. Contest 511 was an entirely new proceeding and distinct from procedures preliminary to patent application. Service upon Mr. Sweeney, as attorney for appellant, would have been proper if, and only if, appellant had authorized Mr. Sweeney to represent it in such proceeding. See Solicitor's Opinion, M-36514 (August 21, 1958).

An appearance had not been entered on behalf of appellant in contest 511, and appellant's president, as registered agent for the company, was a proper party to be served with the complaint.

Regulation mandatory

Appellant finally requests that the Department waive its regulations to allow the late filing of its answer. The applicable regulations appear in 43 CFR 4.450 1/ as follows:

> § 4.450-6 Answer to complaint
>
> Within 30 days after service of the complaint * * *, the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint * * *.
>
> § 4.450-7 Action by Manager
>
> (a) If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing.

Appellant was served with the complaint on September 26, 1972. Appellant delivered the complaint to Mr. Sweeney on October 10, 1972. Such complaint contained the express warning that if an answer was not filed within 30 days after service, the complaint would be taken as admitted and the case decided without a hearing. The answer was

1/ While 43 CFR 4.450 relates to private contests, 43 CFR 4.451-2 provides that Government contests are to be governed by the same rules, with exceptions not material here.

filed on behalf of Montezuma on October 27, 1972, at 3:15 p.m. The 30-day period prescribed by the regulation for filing an answer expired on October 26, 1972. As a result, the appealed decision declared the claims null and void for failing to make a timely filing of the answer.

The Department has construed the regulations governing the filing of an answer to a contest complaint to be mandatory, rather than directory, so that in the absence of extraordinary circumstances, the Secretary is without authority to permit the late filing. James D. Lindsay, 10 IBLA 238 (1973); see United States v. Sainberg, 5 IBLA 270, 272 (1972), aff'd sub nom. Sainberg v. Morton, Civil No. 72-217 (D. Ariz., September 13, 1973). See McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955).

Appellant argues that the Department has not consistently held that the regulations are mandatory. Appellant cites United States v. Humboldt Placer Mining Co., 71 I.D. 434 (1964). In Humboldt the Solicitor stated that a petition for acceptance of an untimely answer was invited because the proceedings were instituted by the Bureau of Land Management, the interests of third parties were not involved, and the Circuit and Supreme Courts were under the impression that the contest proceeding had been held in abeyance pending a final decision. In Lindsay, supra, a recent case decided by the Board, the Departmental position was reaffirmed that a late filed answer may not be accepted, except in extraordinary circumstances.

In the case herein, appellant alleges that unusual circumstances are involved and urges that the relief accorded in Humboldt be granted. However, the details of circumstances that would justify acceptance of the answer for reasons of due process or for other extraordinary circumstances have not been raised by appellant in its statement of reasons. 2/ Appellant's considerable expenditure and the fact that the Bureau of Land Management and the Forest Service were aware of appellant's exploration efforts, subsequent to initiation of the contest, unfortunately does not change the mandatory nature of the Secretary's regulation. The record discloses that the answer was hand-delivered to the Colorado State Office on October 27, 1972, one day late. Attorneys for appellant admit in an affidavit filed with their petition to the State Office that the answer was prepared on October 25, 1972, and that it could have been filed on that date. Therefore, in essence, appellant is stating that appellant's attorneys mistakenly believed that the answer would be timely if filed on

2/ In the statement of reasons for appeal, appellant no longer contends that the late filing was due to incorrect information received from a Bureau of Land Management employee.

October 27, 1972. 3/ It is clear, however, that mistake or inadvertence on the part of an appellant's attorney is not an excuse for noncompliance with the regulations. United States v. J. Hubert Smith, 67 I.D. 311 (1960).

Appellant also directs attention to the case of Price v. Udall, 280 F. Supp. 293 (1968), which involved the late filing of a statement of reasons for appeal. Therein, the appeal was dismissed by the Department because the statement of reasons was mailed one day late. The court set aside such ruling, finding under the circumstances that the Secretary's action in approving such dismissal was arbitrary and capricious. However, Price was modified on appeal sub nom., Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969). The words in 43 CFR 1840.0-7 and 1842.5-1 (1964), now 43 CFR 4.412 (1972), governing the filing of the statement of reasons on appeal were held to be directory rather than mandatory. The court stated that the dismissal of an appeal because of the late filing of a statement of reasons is discretionary with the Secretary. Because of the differences in wording between the statement of reasons regulation and 43 CFR 4.560-6, the analogy is not persuasive.

The other points raised by appellant have been considered but do not warrant reversal of the decision below.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Joseph W. Goss, Member

We concur:

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Martin Ritvo, Member

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Edward W. Stuebing, Member

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3/ The ten-day grace period provided by 43 CFR 4.422(a) cannot be invoked because the answer was not transmitted "before the end of the period in which it was required to be filed," as provided by the regulation.